SUPREME COURT, U.S.

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In the Supreme Court
of the United States

October Term, 1957
No. ~~1015~~ 131

HERBERT SIMPSON, DONALD M. WOLLAM and JOHN ROGERS MacKENZIE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REUBEN G. LENSKE,
Attorney for Petitioners.

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Petitioner Herbert Simpson prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the District of Oregon.

OPINIONS BELOW

No formal oral or written opinion was rendered by the trial court. The verdict of the jury appears on page 38 of the Transcript of Record. The opinion of the Court of Appeals is not yet officially reported; it is set forth hereinafter as Appendix "A."

JURISDICTION

The Court of Appeals rendered its opinion on February 11, 1957. A petition for rehearing was filed on March 13, 1957, which was denied on April 13, 1957. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Is the following indictment:

"THE GRAND JURY CHARGES:

Introduction

That on or about June 19, 1954, at Portland, in the State and District of Oregon, a duly authorized subcommittee of the Committee on Un-American Activities of the House of Representatives of the Congress of the United States of America was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress.

That the defendant, HERBERT SIMPSON, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. At the place and time stated, the defendant, Herbert Simpson, refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into each of the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant, Herbert Simpson, and which he, the said Herbert Simpson, refused to answer, all in violation of Title 2, U.S.C., Sec. 192.

COUNT I

Mr. Simpson, would you please state your residence?

COUNT II

Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?

COUNT III

Where are you presently employed, Mr. Simpson?

COUNT IV

Would you give this Committee, please, a brief resume of your educational background?

COUNT V

Now, Mr. Simpson, did you ever go to high school?

COUNT VI

Were you ever in the Armed Forces of the United States?

Dated at Portland, Oregon, this 30th day of November, 1954

A TRUE BILL

/s/ Mabel W. Windnagle
Foreman, United States Grand Jury

BAIL $750.00
C. E. LUCKEY
United States Attorney
for the District of Oregon
/s/ C. E. Luckey
Endorsed:
Filed December 1, 1954
F. L. Buck, Acting Clerk
by V. O. Bishop, Deputy."

insufficient because:

a. It fails to set forth what the question under inquiry was?

b. It fails to allege that the refusal to answer the questions was willful and/or unlawful?

c. It fails to allege that the refusal to answer the questions was without just, proper or legal cause?

d. It appears on the face of the indictment that the questions asked have no pertinence to the authority of the Un-American Activities Committee under Public Law 601 and there is no allegation of facts showing any pertinent relationship.

2. Is a person charged with violation of 2 U.S.C. 192 entitled to a trial by jury on the issue of pertinency of the question to the question under investigation by congress (presuming that there is a sufficient allegation of pertinency in the indictment)?

3. Is it the intention and effect of 2 U.S.C. Sec. 192 that a crime under that section is committed when a person refuses to answer a readily ascertainable simple factual question, the answer to which simple question has already been ascertained and is known by the inquiring committee of Congress?

4. When a Congressional Committee interrogates a witness about a matter in relation to which it has incriminating evidence against the witness and has introduced such evidence by other witnesses and the witness refuses to answer the questions under the privilege granted him by the Fifth Amendment to the United States Constitution, may the witness also rightfully claim the privilege as to identifying questions?

5. Does a trial court abuse its discretion under Rule

17 of the Federal Rules of Criminal Procedure in refusing an indigent defendant a subpoena duces tecum and an opportunity for inspection where a timely motion supported by a sufficient and uncontradicted affidavit was made?

6. Did the Court of Appeals sanction such accumulated departures of the trial court from the accepted and usual course of proceedings as to call for exercise of the Supreme Court's discretion in reviewing the action of the lower courts in this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Sec. 2, Paragraph 3:

"The trial of all crimes, except in cases of impeachment, shall be by jury; . . ."

Amendment V:

"Rights of accused in criminal proceedings . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

Amendment VI:

"Criminal proceedings—Speedy trial—Trial by Jury—Venue of action—Compulsory process. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."

STATUTES INVOLVED

2 U. S. C. Section 192, R. S. 102 (52 Stat. 942), as amended:

"Refusal of witness to testify.

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828) and House Resolution 5 of the 83rd Congress:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"RULE XI

"Power and Duties of Committees

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively . . .

"(q)(1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the

extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Rule 7(c) of the Federal Rules of Criminal Procedure provides in relevant part:

"Rule 7. The indictment and the Information.

(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . ."

The salient portions of Rule 17 are as follows:

"Rule 17. Subpoena

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

STATEMENT OF THE CASE

The Committee on Un-American Activities of the House of Representatives issued numerous subpoenas for witnesses to appear in a court room of the U. S. Court House in Portland, Oregon to testify on June 18, 1954, Press, radio and television facilities and personnel were on hand and used to broadcast the hearings held before a sub-committee of that committee on June 18 and 19 and petitioner was called to testify and did testify on June 19. At these hearings, both before and after petitioner testified, testimony was given that petitioner was a communist. Numerous questions were put to petitioner, amongst which petitioner was asked whether he was a communist and whether he was at that time a member of the State (Oregon). Central Committee of the Communist Party. Petitioner answered some of the questions but refused to answer most of them on constitutional grounds, including the Fifth Amendment of the United States Constitution.

Four of the witnesses who were subpoenaed and testified at that time and refused to answer most of the questions put to them were indicted under Title 2 U.S.C. Sec. 192 and the cases of three of the four were set to be tried January 19, 1955, before the same general jury panel. The first case tried was that against Donald Wollam, which was tried and concluded on January 19 and a verdict of guilty rendered. Petitioner's case was the second tried, on January 20, 1955, before the same general jury panel, some of the jurors being jurors who sat on both petitioner's case and the Wollam case.

The only prosecution witness in all three case was Robert Kunzig, who had been the Committee Counsel at the time of the hearings before the sub-committee on June 18 and 19, 1954. None of the indictments alleged as a crime the refusal to answer questions put to the witnesses on whether they then were or had been members of the Communist Party. A verdict of guilty was rendered against petitioner on all five counts, the trial court having dismissed the count on the question of where petitioner was employed.

Petitioner duly filed a motion for a new trial and also a motion to permit petitioner to present evidence to the Court on the issues of pertinency and privilege, the Court having ruled that these issues were to be determined by the Court and not the jury. These motions were argued and denied on January 31, 1955 and petitioner was sentenced to ten months in jail and fined $250.00. From this order of conviction and sentence petitioner appealed and was allowed bail. The Court of

Appeals for the Ninth Circuit affirmed the conviction on the first count and this petition seeks a writ to the Court of Appeals to review the conviction and affirmance.

Re Question 1

In holding that the indictment was sufficient against a motion to dismiss and a motion for acquittal the Court of Appeals

A.

Rendered a decision in conflict with the decision of another court of appeals on the same matter and

B.

Decided a federal question in a way in conflict with applicable decisions of this court and

C.

Has decided an important question of federal law which has not been, but should be, settled by this Court.

Argument 1a

Re failure of indictment to set forth the question under inquiry.

In the Sinclair case the indictment stated in detail what the committee was investigating but in most of the recent prosecutions under 2 U.S.C. Sec. 192 the indictments merely state, as was done in the instant case, that the committee was conducting hearings pursuant to Public Law 601 and H. Res. 5. Under that resolution that committee is authorized to investigate more than one question. The Supreme Court has not to date but should decide whether the failure to set forth *the ques-*

tion as required by the statute deprives an accused of due process under the Fifth Amendment and violates the "and to be informed of the nature and cause of the accusation" clause of the Sixth Amendment.

Argument 1b

Re failure of the indictment to allege willful or unlawful or both.

The question has been properly raised whether an indictment under this section is sufficient if it merely alleges the refusal to answer to be unlawful or willful. The instant case is the only case in which a United States Court of Appeals upheld a conviction on an indictment under 2 U.S.C. Sec. 192 which did not allege that the refusal to answer was willful or unlawful or both. Following is the confused status of the law. In Sinclair v. U. S., 279 U.S. 263 (1929), the Supreme Court held that the allegation "willful" was not essential to the indictment because the indictment did allege that the refusal to answer was "unlawful." Furthermore the indictment in the Sinclair case does allege that the refusal was deliberate.

In U. S. v. Deutsch (C.A. D.C. 1956), 235 F. 2d 853, the U. S. Court of Appeals for the District of Columbia said that the indictment need not allege "willful" but that indictment did allege that the refusal was "unlawful." In U. S. v. Lamont, 236 F. 2d 312 (C.A. 2, 1956), the U. S. Court of Appeals for the 2d Circuit affirmed the dismissal of an indictment that failed to allege either "willful" or "unlawful." It did not reach the specific question of whether either or both is necessary or suf-

ficient but the District Court in that case had and the Appeals Court did say, "Judge Weinfeld's scholarly opinion is reported at D.C.S.D.N.Y., 18 F.R.D. 27."

Argument 1c

Re failure of the indictment to allege either in general or specific terms that the refusal of petitioner to answer the questions was without just, proper or legal cause.

The failure of the court to require such allegation in the indictment is a violation of the due process clause of the Fifth Amendment and the "to be informed of the nature and cause of the accusation" clause of the Sixth Amendment.

In view of the numerous prosecutions in these current years under 2 U.S.C. Sec. 192 a definitive statement should come forth from the highest court of the land setting forth, as is suggested by the Court of Appeals in the Lamont case, the minimum requirements in an indictment under this section. No one claims that every refusal to answer questions of a Congressional Committee is a violation of that section. There must be something more than such refusal to make a crime. Not long ago a Congressional Committee subpoenaed Judge Louis Goodman, a judge of the U. S. District Court for the Northern District of California, with the view of interrogating him relating to certain Grand Juries. The subpoenaed judge, in a statement concurred in by the other District Court judges of that district, refused to appear, stating that under the separation of powers doctrine of our constitution Congress had no right to question him. Nothing further came of the matter but, supposing he had appeared and then refused to answer

the questions put to him, would an indictment against him have been sufficient to put him to trial if it had merely alleged his refusal to answer the questions without setting forth allegations to show that the refusal was without just, proper or legal cause? The answer seems so clear and the principle so fundamental that it should be applied in all cases arising under that section.

Another analogy is where a person is charged with a crime in taking another person's property. If the allegation does not show in some way that the taking was wrongful a person could be legally indicted for taking another person's property when he was authorized by the owner to do so. Certainly it is not due process to say the indictment will stand but if the defendant goes to trial and proves that he had authority he will be held not guilty.

Argument Id

Re failure of the questions asked to have any pertinence to the authority of the Committee under Public Law 601.

In the Lamont case the Court took judicial notice of Public Law 601 and held that the questions asked had no relationship to the authority of the committee involved. The same is true here. There is no obvious pertinence of petitioner's residence or education to the authority of the committee herein involved. On the face of the questions there is no pertinence. If there were in fact pertinence such facts should be alleged in the indictment. In the Lamont case, where the indictment showed no pertinence there was an acquittal, in the instant case there was a conviction. The Supreme Court should resolve the difference.

Re Question 2

In holding that pertinence is not a question for the jury guaranteed to petitioner under the Fifth and Sixth Amendments, the Court of Appeals made a decision in conflict with that of another court of appeals on the same matter.

Argument 2

Re right of trial by jury on the issue of pertinence.

In the Sinclair case the Supreme Court stated that pertinency was a matter of law for the court to decide. That was in 1929 before the rush of recent cases and indication is that there was no contrary evidence. Moreover, two divergent views have developed of the real intent of the court when using the language that it did in the Sinclair case. The Circuit Court of Appeals for the 3d Circuit, in U. S. v. Orman, 207 F. 2d 148 (1953), says on page 155 that in the Sinclair case the Supreme Court explained that the "question of pertinency was rightly decided by the court as one of law." But it points out with emphasis on page 156 that the Supreme Court further said, "It did not depend upon the probative value of evidence." The Circuit Court then goes on to say on page 156:

> "In the instant case, however, evidence aliunde was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was an element of the criminal offense. We conclude that in this situation the trial court, taking the evidence as true, retains the power to decide that pertinency has not been established. But if the court concludes that pertinency has been proven, it is proper for it so

> to rule and then to submit the question and the evidence to the jury under appropriate instructions. This in substance is what the court below did."

In Keeney v. U. S., 218 F. 2d 843, D.C., decided on Aug. 26, 1954, each of the three judges felt bound by the language in the Sinclair case but two of the judges further stated that pertinency should be a jury question. Judge Edgerton said on page 845:

> "If the Supreme Court had not ruled otherwise, we should have thought this a matter for the jury to decide, like any other element of the crime with which the appellant was charged."

Judge Prettyman said on page 849:

> "Were it not for the unequivocal holding of the Supreme Court in the Sinclair case, I would think that, since pertinency is an element of this offense, it, like all other such elements, would be for the jury. Since the Supreme Court holds the issue is not for the jury, I agree that evidence which is not relevant to the issues before the jury and which is highly prejudicial to the accused on those issues, ought not be heard by the jury."

Since pertinency is an integral part of the crime as set forth in the act the right to trial by jury on that issue is guaranteed by the Sixth Amendment to the Constitution. The proper interpretation of the Sinclair case appears in the Orman case and under that interpretation petitioner was entitled to and should have been granted a jury trial on that issue. The divergence of interpretations by the Courts of Appeal should in any event be resolved by the Supreme Court.

Re Question 3

In affirming petitioner's conviction, the Court of Appeals has decided that it is the intention and effect of 2 U.S.C. Sec. 192 to make it a crime for a person to refuse to answer a simple factual question, the answer to which has been ascertained and is known to the inquiring committee. This question has not been and should be settled by the Supreme Court.

Argument 3

The Court of Appeals affirmed petitioner's conviction on only the first question, i.e., "Mr. Simpson, would you please state your residence?" This was a readily ascertainable fact and the trial court refused to permit petitioner to adduce conclusive evidence that the Committee knew petitioner's residence. That it did know, however, is demonstrated by the next question, i.e., "Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?"

If a committee knows a simple, ascertainable fact, then clearly the asking of that question cannot be to serve a legislative purpose. If the Supreme Court should hold that petitioner's position is well taken, much vexatious and useless questioning at public expense may be stopped.

Re Question 4

The Court of Appeals rendered a decision in conflict with another court of appeals and in conflict with the decisions of this Court in refusing to hold that a witness who rightfully exercises the privilege under the Fifth Amendment as to questions on which the inquiring committee has incriminating evidence against the witness, may also exercise the privilege as to identifying

questions which would identify him as the person against whom the committee has that incriminating evidence.

Argument 4

In U. S. v. Trock, 232 F. 2d 839, the Court of Appeals for the 2d Circuit said on April 9, 1956 at page 843:

> "It has not yet been said by the Supreme Court that questions innocuous in themselves in a 'setting' or chain, such as is revealed in the record before us, would justify the witness in refusing to comply with the court order."

The Court of Appeals in that case affirmed the conviction as did the Court of Appeals in petitioner's case. However, in quite a similar case on principle the Court of Appeals of the 2d Circuit, in U. S. v. Gordon, 236 F. 2d 916, said on Sept. 12, 1956 on page 920:

> "The government argues that answers at least to some of the questions, when taken singly, are remote from any tendency to incriminate. Even so assuming arguendo, we reject that argument for these reasons: The questions together form such a cluster as to interrelated matters that to separate out any one of them, treating it as if it stood alone, would be to artificialize the actualities."

The Trock case would represent a divergent view in the second circuit to that of the ninth circuit as indicated by the opinion in petitioner's case but in view of the fact that the Supreme Court granted certiorari in the Trock case and reversed the judgment on June 11, 1956 in 351 U.S. 976, the Circuit Court of Appeals of the Ninth Circuit decided petitioner's case directly in conflict with the decision of the Supreme Court in the Trock case and the decision n Hoffman v. U. S. (1951), 341 U.S. 479.

The setting in the instant case included testimony both prior to and after petitioner's testimony wherein so-called friendly witnesses testified that petitioner was a communist. The cluster of seventeen questions asked of petitioner included those of which Robert L. Kunzig testified as follows (Tr. of Proc. pages 83, 84):

> "Q. Were you ever chairman of the finance committee of the Communist Party for the State of Oregon?
>
> Q. Were you ever chairman of the finance committee of the Communist Party for the City of Portland?
>
> Q. Now isn't it a fact, Mr. Simpson, that you have been in the Communist Party for fifteen years and that this very moment as you sit before this Committee of your Congress that you are a member of the State Committee of the Communist Party of Oregon?"

Mr. Kunzig testified (Tr. of Proc. page 80):

> "Then the testimony came of these two specific witnesses, also in public testimony, saying, as I recall—and the record would show—that they knew he had been a Communist."

Following is testimony from page 81 of the Tr. of Proc.:

> "Q. Mr. Kunzig, will you please confine your answer to the following question: Was it not the purpose of the Committee in subpoenaing Mr. Simpson to inquire as to whether or not he was a Communist?
>
> A. That would have only been one small purpose of the Committee.
>
> Q. That was one of the purposes of the Committee was it not?
>
> A. It would be one of the purposes to find out whether he was a Communist."

Mr. Kunzig testified (Tr. of Proc. page 48):

" . . . But the Committee had information that we could get information under oath about Communist activities from men such as the witness here today—the defendant here today, Mr. Simpson—from men such as Mr. Owens, and others. Mr. Owen chose to answer all the questions and told everything he knew about the Communist conspiracy, and Mr. Simpson chose not to answer the questions."

Tr. of Proc. page 23 shows the following testimony of Mr. Kunzig:

"Mr. Carney: Q. We are asking in this question specifically what was the purpose of the inquiry in Portland.

A. Well, in general, as I said before, it was to investigate subversive and Communist activities in this area. I don't know how I could be very much more specific than that.

A. The Committee was interested, sir, in seeing whether there were any subversive activities, for example in connection with labor unions, in connection with education as such. . . ."

And on page 24 of Tr. of Proc. and running into page 25:

"Q. I will ask you whether the Committee had before it any information of this character you just testified to regarding the defendant Herbert Simpson.

Mr. Lenske: I object to that, your Honor. . . .

The Court: Objection overruled. Go ahead and answer.

A. Yes, sir. The Committee was in possession of confidential information that Mr. Simpson had knowledge, extensive knowledge, of Communist activities in this area, and . . . We also were interested in hearing what Mr. Simpson had to say, because we had information that Mr. Simpson had

been for some time in association with suspected Communists in this area; that he knew them, he knew their activities. . . . In connection therewith we had information, confidential information, that Mr. Simpson was a member of the Communist Party. This was borne out, that information, by sworn public testimony right in this building when we were here, where a Mr. Canon said—I have forgotten the name of the other witness—Mr. Owen—these two gentlemen both testified under oath that they knew or had information that the defendant here today, Mr. Simpson, had been a member of the Communist party and I believe, if I recall correctly, even on the State Central Committee of the Communist Party here in Oregon."

On pages 20 and 21 of Tr. of Proc. Mr. Kunzig testified:

"Mr. Carney: Q. What was the purpose of the hearing at Portland, Oregon?

Mr. Lenske: . . . That is objected to. . . .

The Court: Objection overruled. . . .

A. The Chairman, Harold H. Velde made an opening statement which I cannot quote verbatim. It is in a public record. I don't know it by heart, but in general, from my own knowledge, the purpose of our hearing in Portland was to investigate in general subversive activities or Communist activities as they may exist in this part of the United States."

From Mr. Kunzig's testimony on pages 33 and 34:

"Mr. Carney: Q. What was the purpose of the inquiry of Mr. Herbert Simpson as to his residence?

A. We asked that question, sir, as we always do, to fix the identity of the witness. It is very important for the Committee to know who the witness is that is sitting before it. We may think that we know, but as happened very recently in Washington before another committee, just in the last few

months, by the questions they brought out that the wrong man was sitting before the committee. We always ask for identification purposes that question, sir."

Following is some of Mr. Kunzig's testimony on pages 85 and 86:

"Mr. Lenske: Q. Now, after you inquired the name, would you make inquiry as to identifying questions further about the individual?

A. Always; as I have explained earlier today, the Committee desires to have clear identification of the person; where he lives, his education, and so forth and so on.

Q. Those are asked as identifying questions?

A. That is certainly one of the major purposes.

Q. Does that mean that there might be another Herbert Simpson . . . and your purpose is to identify this person through these means as that particular Communist and not another person?

A. Let me answer that this way: That many is the time—to use the name Herbert Simpson taken hypothetically—many is the time there turns out to be five Herbert Simpsons in Portland, and we get telephone calls from the other four saying, 'Wait a minute. I am not the one that is in the Communist Party.'"

Clearly the Court of Appeals has rendered a decision in this case directly in conflict with the applicable decisions of the Supreme Court.

Re Question 5

The Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this court when it affirmed the trial court in refusing petitioner a subpoena duces tecum for which a timely motion was made supported by a sufficient and uncontradicted affidavit.

Argument 5

The controlling decision on this issue is Bowman Dairy Co. v. U. S., 341 U.S. 214, and the uncontradicted factual situation appears on pages 31 through 38 of the Transcript of Record. The constitutional provision involved is the following clause of the Sixth Amendment: "to have compulsory process for obtaining witnesses in his favor." Also the due process clause of the Fifth Amendment.

Re Question 6

The Court of Appeals sanctioned such accumulated departures of the trial court from the accepted and usual course of proceedings as to call for the exercise of the Supreme Court's discretion in reviewing the action of the lower courts in this case.

Argument 6

In addition to the sanctioning of the trial court's resolving of the first five issues set forth in this petition, against the petitioner, the appeals court sanctioned the following material errors of the trial court.

a. Proceeded with the same jury panel that sat in the same court room on the preceding day from which a jury of twelve was chosen that tried Donald Wollam and convicted him, and

(1) the issues in the two cases were almost identical, and

(2) some of the same jurors sat on both cases, and

(3) both cases involved to a material extent the credibility of Robert L. Kunzig, the sole prosecuting witness in both cases, although

(4) petitioner objected to that panel (Tr. of Proc. page 8).

b. Refused to permit the Portland agent of the F.B.I. to answer questions propounded to him to show that the United States had information, which was made available to the committee, that justified petitioner in exercising his privilege under the Fifth Amendment to refuse to answer each of the questions on which the indictment was based (Tr. 18, 19).

c. Permitted, over petitioner's objection, material acts of Congress, the committee and the subcommittee to be proved by parol evidence without showing that the records of the alleged acts were unavailable (Tr. 15, 17, 19, 20).

d. After ruling that both pertinency and privilege were not issues for the jury, failed to provide opportunity to petitioner to present evidence on those issues outside the presence of the jury.

(1) Denied petitioner's motion after verdict for an opportunity to present evidence on the issues of pertinency and privilege. See Hoffman v. U. S.

e. Petitioner was sentenced to ten months in jail and a $250 fine, apparently in part for something that petitioner did not say, as the entire record shows, i.e., "this Government that you condemned or condemn" (Tr. of Proc., Part 2, page 62).

CONCLUSION

Because of the insufficiency of the indictment, the obvious deviation of the lower court from the decision of the Supre ne Court in the Trock case and because our government is too big to put a citizen in jail for so little and because of the other reasons herein set forth this petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Petitioner,
Herbert Simpson

JOINDER OF PETITION BY DONALD M. WOLLAM AND JOHN ROGERS MacKENZIE

Donald M. Wollam, whose case was the first of the three tried consecutively in the District Court for the District of Oregon commencing January 19, 1955, joins in the petition of Herbert Simpson and adopts issues 1 through 6 and the arguments supporting the reasons why the Supreme Court should issue the writ to determine those issues and raises the following additional

QUESTIONS PRESENTED

7. Did the Chairman of the subcommittee instruct petitioners to answer the questions in accordance with the strict standards required by the Supreme Court in Quinn v. U. S., 349 U.S. 155, and Emspak v. U. S., 349 U.S. 190?

8. Should the right to exercise the privilege under the Fifth Amendment be liberally construed in favor of the witness?

Argument 7 and 8

The answer to Question 7 should be "No" and to Question 8 is obviously "Yes." No oral opinion was rendered by the District Court, the judgment being based on a verdict of the jury. The written opinion of the Court of Appeals against Donald M. Wollam appears herein as Appendix B. That the privilege should be liberally construed in favor of defendants and that a person is innocent until proved guilty require no authorities or argument. But the opinion in Appendix B

shows on its face that the privilege was construed liberally against, rather than for the accused and that the decision is in direct conflict with the Emspak, Quinn, Hoffman and Trock decisions of the Supreme Court.

The opinion acknowledges that the disclosure of one's address could lead to incrimination and therefore could be protected under the privilege. Yet the opinion also takes it for granted that in the indictment the purpose of the question "was obviously simply one of identification" and therefore "the pertinency is not obscure." Pertinency should not be taken for granted. It must be pleaded and proved. The purpose of asking the question "What is your present address?" could be manifold. The court should not arbitrarily and categorically adopt a purpose for the question which does not appear in the indictment; certainly, given more than one choice, it should not pick a construction ~~out of the air~~ that ~~it thinks~~ could constitute a link in a crime as against one that would presume a defendant innocent.

This is especially true when in the same cluster of questions the witness is asked:

> "Now were you a member of the Communist Party when you were a private, first class, in the United States Army?"
>
> ". . . let me ask you if it isn't true that you are today . . . a section organizer of District 11 Committee of the State of Oregon Communist Party. . . .?"
>
> "Mr. Wollam, have you ever been engaged in any espionage activities against the United States?"

A liberal construction in favor of an accused should lead to the conclusion that the Emspak, Hoffman and Trock cases have not been followed, that pertinency does not appear on the indictment, that Donald M. Wollam had sufficient cause to fear from some of the questions asked that the Committee had something up its sleeve in asking others. The need for review by the Supreme Court is enhanced because the Court of Appeals indicates that the following was an "untenable reason" rather than an invocation of the Fifth Amendment:

> "3. He was afraid if he started answering questions he might go too far and answer one too many questions; thus, waive his rights."

John Rogers MacKenzie, whose case was the third of the three cases mentioned, joins in the petition of Herbert Simpson and adopts issues 1 through 8 and the arguments supporting the reasons why the Supreme Court should issue the writ of certiorari. His case in the District Court was tried on January 21, 1955 and there was no oral opinion by the court, it having been tried before a jury from the same panel as that of Herbert Simpson and Donald M. Wollam and some of the jurors having sat on the first two cases and, as in the first two cases, the sole witness for the prosecution having been Robert L. Kunzig. The written opinion was rendered on May 2, 1957 and appears in this petition as Exhibit C.

CONCLUSION

The Court of Appeals said, "What has been said in Wollam's case is applicable here." It was already pointed out that in that case the Court of Appeals arbitrarily assumed that the question of residence was asked for identifying purpose and therefore was pertinent as such to the question under inquiry. The indictment in petitioner MacKenzie's case was similar to that in petitioner Wollam's case. Yet in petitioner MacKenzie's case we find the following question:

> "Isn't it a fact, Mr. MacKenzie, that Communist Party meetings were held in your home?"

For the court to assume pertinency in the indictment where pertinency does not appear and for it to deny privilege where privilege should be obvious, is such a departure from the accepted and usual course of proceedings as to call for review by the Supreme Court. Also the following principle merits consideration.

In administering the privilege under the Fifth Amendment the Government may not do in two proceedings that which it may not do in one. Thus, it may not require a witness before a grand jury or a legislative committee or a defendant before a petit jury to give testimony that would identify him as the person against whom other incriminating evidence exists. The Government may not then by a second proceeding, i.e., a contempt prosecution, require him to testify against himself or, as an alternative, pay the penalty for the contempt that may have been meted if prosecuted and

found guilty of that for which the inquiry was conducted.

Respectfully submitted,

REUBEN G. LENSKE,
Attorney for Petitioners
Herbert Simpson, Donald M. Wollam
and John Rogers MacKenzie.
Lawyers Building,
1123 S. W. Fifth Ave.,
Portland, Oregon.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT SIMPSON,)
Appellant,)
vs.) No. 14,743
) Feb. 11, 1957
UNITED STATES OF AMERICA,)
Appellee.)

On Appeal from the United States District Court for the District of Oregon

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Before: FEE, CHAMBERS and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

Before a Congressional sub-committee conducting a phase of an investigation at Portland, Oregon, Herbert Simpson on June 19, 1954, refused to answer the following questions:

1. Mr. Simpson would you please state your residence?

2. Isn't it a fact that you live at 9115 North Geneva, Portland, Oregon?

3. Would you give this committee, please, a brief resume of your educational background?

4. Now, Mr. Simpson, did you ever go to high school?

5. Were you ever in the armed forces of the United States?

The ground for refusal Simpson stated was the questions would tend to incriminate him. He relied on the Fifth Amendment of the Constitution of the United States which reads in relevant portion as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

On November 30, 1954, a federal indictment was handed down by the grand jury at Portland. It contained a count for the refusal to answer each question. Contempt of Congress was charged. See 2 U.S.C.A. § 192. It asserted that the hearing was being conducted pursuant to 60 Stat. 828 by a sub-committee of the Committee on Un-American Activities of the House of Representatives.

Conviction by a jury on the five counts on the five questions set forth above followed on January 20, 1955. On January 31, 1955, a concurrent sentence of ten months imprisonment was imposed on each count. A fine of $250 was levied on the first count (Mr. Simpson would you please state your residence?) alone.

All of the sentences on the last four counts, being within the limits of the first count and no part of the same four counts being cumulative, this court need proceed no further than the first count, if the judgment thereon is sustained. Goldbaum v. United States, 9 Cir., 204 F.2d 74. Winger v. United States, 9 Cir., 233 F.2d 440.

Appellant's sweep on appeal is broad with 25 specifications of error. The opinion will be limited to the few having some vitality.

In the eleventh specification of error Simpson asserts the indictment was defective in that it fails to charge that the refusal was "willful or wrongful or unlawful." The indictment in the charging language merely says, "* * * the defendant refused to answer those pertinent questions:"

The statute reads as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes a default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

An indictment of course should concisely tell the story of what the defendant is charged with doing. While writing the charging language that precedes stating what this defendant has done, it is always at least good practice, and ordinarily required, that one follow the statute. "Willfully" here in Sec. 192 only modifies "makes default." It does not reach through to "refuses to answer." This is a misdemeanor statute. That is an important factor here. Of course, "refuse" necessarily imports "in-

tentionally." "Refusal" is not consistent with words of declination made by one asleep or knocked unconscious or by one who did not understand the English language. While the indictment had no spare words, it was sufficient. The protection to which the defendant was entitled, an instruction that the refusal must be intentional, was given by the trial judge to the jury.

Appellant complains that it was improper for the court to decide the issue of pertinency of the question to the Congressional Committee inquiry. That point was settled in Sinclair's case, 279 U.S. 263.

Some specifications go to the scope of the "privilege" under the Fifth Amendment. In the question, "Mr. Simpson, would you please state your residence" there seems to be nothing approaching the proscriptions laid down in Hoffman v. United States, 341 U.S. 479. This is on its face a question of identity. It separates this witness from all the other Herbert Simpsons in the United States and perhaps, even another Herbert Simpson in Portland.

Conceivable cases might be presented to illustrate how stating one's address would tend to incriminate. But certainly in the unusual case some burden is on the defendant or his counsel to suggest at some time, some place during his interrogation[1] (that is not to say absolutely prove) how facts ordinarily not incriminating might reasonably tend to be incriminating in their special setting.

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[1]If not at the interrogation, at least before his criminal case is submitted for decision.

As the Fifth Amendment becomes more and more of a recurring problem, there will be borderline cases on delineation, but this is not one of them.

Another specification charges that Simpson committed no crime in refusing to answer as to his place of abode because the Congressional Committee already knew where he lived. The point may have some naked validity, but will not stand inspection. It is the very essence of almost any inquiry to find out who a man is. The informal knowledge one has of where a witness lives and of his identity may be entirely erroneous. Identity established, an inquiry can proceed to the subject at hand, but the fact that finding out where Simpson lives is not the ultimate objective of the interrogation does not make where he lives impertinent, unessential or immaterial.[2]

The judgment is affirmed.

(Endorsed:) Opinion. Filed 11, 1957.

Paul P. O'Brien, Clerk.

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[2]Recent cases, particularly with reference to pertinency and propriety of questions, which this court believes to be in line with the decision announced herein are Barenblatt v. United States, D.C. Cir., F.2d , and Sacher v. United States, D.C. Cir., F.2d , (Nos. 13,327 and 13,302. Both decided Jan. 3, 1957.)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD M. WOLLAM,)
Appellant,)
vs.) No. 14,744
) May 2, 1957
UNITED STATES OF AMERICA,)
Appellee.)

Appeal from the United States District Court
for the District of Oregon

Before: FEE, CHAMBERS and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

This case is a companion of Simpson v. United States, No. 14, 743, 9 Cir., ... F.2d .....

Here Donald M. Wollam was a witness before the same Congressional subcommittee (before which Simpson appeared) conducting an investigation on June 19, 1954, and he refused to answer the following questions:

1. Mr. Wollam, what is your present address, sir?

2. Now, Mr. Wollam, what is your present employment?

3. Did you ever attend elementary school; and if so, where?

4. Did you ever attend high school, Mr. Wollam?

5. Now, did you ever attend college, Mr. Wollam?

Various grounds were variously stated by Wollam for the refusal to answer which he made. None was later relied on except the claim that an answer might tend to incriminate. It is asserted that he was protected by the Fifth Amendment of the Constitution, the safety of which he claimed.

Indictment with a count for each refusal followed on December 1, 1954. Trial by jury and conviction on each count followed on January 19, 1955. Identical concurrent prison sentences were imposed on each count. In addition, there was a fine of $250 levied on the first count.

As we said in Simpson, if the conviction is valid on the first count, we need not examine the other four counts. In our opinion, the judgment is correct on the first count.

The approach of the appeals in Wollam and MacKenzie varies in some detail from that presented in Simpson; thus, this second opinion.

Appellants contend that the indictment did not plead or prove the pertinency of the questions. Where the question (Mr. Wollam, what is your present address, sir?) is obviously simply one of identification of the witness the pertinency is not obscure. If the witness had been asked if he was familiar with some dolphin in the Willamette River, then an explanation of its pertinency might be required in the indictment. Details of the dolphin's relevance should follow in the proof.

It is argued that it is not evident from any testimony what relevance defendant's address had to the purpose of the investigation. Testimony of any kind must be laid stone on stone. The first relevant point is: Who is the

witness, anyway? Certainly the test of pertinency is not whether the question itself was in the ultimate area of investigation: Communist activities in the Pacific Northwest states. It is pertinent if the question is a usual and necessary stone in the arch of a bridge over which an investigation must go.

We next come to the problem of whether defendant was insulated by the Fifth Amendment from answering: "Mr. Wollam, what is your present address, sir?"

In Simpson we said that at the committee interrogation, or at least no later than his trial, the witness or his counsel must demonstrate how the question might be dangerous for him to answer; i.e., lead to a disclosure which he had a right to protect against. Here on appeal counsel import by their own leave a committee hearing report containing the testimony of earlier witnesses who testified of Communist underground activities. These witnesses had testified that underground Communist members conceal their addresses, ages, jobs. Also, it was related that homes were used by Communists in the underground as "mail drops." It is well settled since Sinclair v. United States, 279 U.S. 263, that the trial judge decides and tells the jury whether the defendant had a right to claim the privilege which he, the defendant, asserted. This background of testimony prior to Wollam's appearance was never presented to the trial court by the defendant, although he, Wollam, had abundant opportunity to do so. Strange indeed would it be if we were to receive the evidence offered for the first time here and find it justified the defendant's refusal to answer. This court reviews the trial court's

record. Able counsel for the defendant know this. We, therefore, do not consider this collateral record tendered us, other than to decide we should not consider it.[1]

Under the historical development of the privilege against self incrimination, it is only in direct defense of a crime that a defendant does not have to be sworn (or affirm) and take the stand.[2] If within the territorial limits of jurisdiction, a witness must respond to a subpoena and take the stand for grand jury and congressional investigations. We assume that he must state his name. Ordinarily we would think that he should identify himself sufficiently to distinguish himself from all the other David Wollams.

Some accommodation must be made to the subpoena power. Suppose five David Wollams were subpoenaed. Suppose each refused to state where he lived on the ground it might tend to incriminate. We don't think a committee ordinarily has to stand for that.

We do not hold that there can never be a case where a witness cannot refuse to state his residence. We do think that a factor to be considered in determining privi-

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[1]Counsel justify the supplemental "beefing up" of the record here by the fact that a supplemental record was effectively used in Hoffman v. United States, 341 U.S. 479. That was a grand jury contempt matter which was judge-tried. There the Supreme Court held a certain affidavit filed in district court was before the court and should have been considered by it and by the court of appeals. And, some of the facts in the affidavit appear to have been within the district judge's experience in the particular case. The supplemental matter in this case has been denied our district judge.

[2]8 Wigmore on Evidence, 3rd Ed., § 2268, p. 388, et. seq.

lege is that it is a rare, rare case where disclosure of address would lead to incrimination. If the case on trial is such a case where address might tend to lead to incrimination, it ought to be pointed out how somewhere before the case goes to the jury, or the possibility should appear to the trial court in the record it had. It was absent here.

Defendant complains that the indictment failed to allege that the refusal was willful. The charging part of the indictment was identical with Simpson's What we said there on this point, we adhere to now. We are satisfied that the question of defendant's intentional refusal to answer was properly submitted to the jury. Also, the instructions are amply adequate.

It is claimed that under Quinn v. United States, 349 U.S. 155, and Emspak v. United States, 349 U.S. 190, and Fagerbaugh v. United States, 9 Cir., 232 F.2d 803, the committee chairman did not properly instruct the defendant to answer. These cases do not stand for the proposition that the last words on the subject of any question must be a demand that the witness answer. In our judgment adequate demand to answer was made. This really must be tested by a fair reading of the record. Therefore, we add as an appendix the record as the trial court had it on what transpired at the congressional hearing with reference to Donald Wollam.[3] This appen-

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[3]On the question of the first count, "Mr. Wollam, what is your present address, sir?", Chairman Velde said, "Yes. You are certainly directed to answer that question." Then subsequently he twice asked if Wollam refused to answer. Added to the demand, the questions rather strengthen than weaken the government's position.

dix is also useful in examining the setting of the questions which Wollam refused to answer, as the trial court had the setting of the questions for study and examination.s

We do not rest our decision on the next point. We do not say that if a witness amplifies his claims with an untenable reason for not testifying then he cannot later fall back on an evident good reason for not testifying, which reason was susceptible of observation by the trial court.

The truth of the matter of refusal may rest in Wollam's statement before the committee that:

1. He was afraid of reprisals to his family.

2. He was not going to join "the stable of stool pigeons."

3. He was afraid if he started answering questions he might go too far and answer one too many questions; thus, waive his rights.

While, as above stated, we do not rely on the three specific reasons he gave, yet his statements certainly do not strengthen his case.

Of course, Hoffman v. United States, 341 U.S. 479, is our guide. We do not believe the conviction here is proscribed by the standards set forth there.

In our examination of all of the cases in recent years where Fifth Amendment contempt convictions have been reversed by the Supreme Court, it is our belief that the possibility of the particular answers to questions supplying some link in a chain was real. See the cases cited in Circuit Judge Hastie's review of the subject in United

States v. Coffey, 3 Cir., 198 F.2d 438. Here we think it was imaginary and perhaps even an afterthought. The refusals are probably accounted for by just the reasons Wollam gave.

Judgment affirmed.

(Endorsed:) Opinion, Filed May 2, 1957.

Paul P. O'Brien, Clerk.

APPENDIX TO OPINION

TESTIMONY OF DONALD M. WOLLAM, ACCOMPANIED BY HIS ATTORNEY, IRVIN GOODMAN

Mr. Wollam: My name is Donald M. Wollam. W-o-l-l-a-m.

Mr. Kunzig. Would counsel please state his name and office address for the record?

Mr. Goodman. My name is Irvin Goodman, Portland Trust Building, city.

Mr. Kunzig. Thank you, Mr. Goodman. Mr. Wollam, what is your present address, sir?

Mr. Wollam. Mr. Kunzig, I refuse to answer that question on the first, under the fourth amendment because I believe that counsel is aware that people who have given their address over this microphone both here and in Seattle have had their homes threatened. I have a wife and family at home who I don't propose to put in jeopardy because of any action I may take here.

Mr. Kunzig. Just shorten it up.

Mr. Velde. You may state your legal grounds.

Mr. Wollam. I don't like your question, Mr. Kunzig, and I will certainly not surrender to you any right that I may have to—

Mr. Velde. You may state your legal grounds, young man, but we're not going to listen to another tirade. Do you have contempt in your heart, when you approach the witness stand, do you have contempt in your heart for this committee of your United States Congress?

Mr. Wollam. I refuse to answer that question on the grounds of the fifth amendment, the decision of United States judge, James Alger Fee, in the case of United States versus—

Mr. Velde. It is apparent that this witness is trying to filibuster. We just can't have that, as I pointed out the other day.

Mr. Kunzig. Mr. Chairman, I respectfully request, in order that the record may be clear and that the witness be warned that there is possible contempt here that he be directed to answer the question as to, that I have just asked, as to his address.

Mr. Velde. Yes. You are certainly directed to answer that question.

Mr. Wollam. Mr. Chairman, I ask to continue my reasons for not answering that question.

Mr. Velde. You have already stated sufficiently the grounds. Now do you refuse to answer?

Mr. Wollam. I have only stated the fourth amendment.

Mr. Velde. Do you refuse to answer upon direction the question as to your address?

Mr. Wollam. I do refuse to answer that question. First on the grounds that I have just stated under the fourth amendment to the Constitution. Secondly I refuse to answer again on the grounds that I have just stated regarding the Alger Fee decision. I refuse to further answer that question under the 1st, the 5th, the 9th, and the 14th amendments to the Constitution of the United States and any other sections of the Constitution that may apply, and also the constitution of the State of Oregon.

Now this may be funny to you, Mr. Kunzig.

Mr. Kunzig. It is not funny.

Mr. Velde. It is very, very serious.

Mr. Kunzig. It is very, very serious.

Mr. Velde. You are the one who is taking this as being funny.

Mr. Wollam. I certainly have no intentions—

Mr. Velde. Proceed to ask the question, Mr. Counsel.

Mr. Kunzig. You will understand now, Mr. Wollam, so that your filibustering may be cut off, we will understand and make sure that your rights are protected. Any time that you refuse to answer we will understand that it is on the grounds of the fifth amendment.

Now, Mr. Wollam, what is your present employment? I am asking that question very seriously.

Mr. Wollam. And I will give you a very serious answer.

Mr. Kunzig. Thank you.

Mr. Wollam. Mr. Kunzig, I refuse to answer it not just on the fifth amendment, as you stated that you would understand my refusals would be based upon, but upon all of the grounds that I have previously stated.

Mr. Kunzig. All right. Mr. Chairman, may I ask you to please direct the witness to answer the question as to where he is presently employed?

Mr. Velde. Yes; you are directed to answer the question as to your employment at the present time.

Mr. Wollam. I refuse to answer the question upon the grounds of the first and fifth amendment to the Constitution of the United States pursuant to article 1, section 10, Constitution of Oregon, which provides in part; that every man shall have—

Mr. Velde. Isn't your refusal—

Mr. Wollam (continuing). Remedy by due course of law for injury done him—

Mr. Velde. Will the witness listen to me for just a minute? Is your refusal to answer based upon the same reasons that you gave before? Is that right?

Mr. Wollam. My refusal to answer is based upon the reason that I just gave plus all else that I have pled here, and I beg leave, Mr. Chairman, I beg leave—

Mr. Velde. All right, proceed, Mr. Counsel.

Mr. Kunzig. Now Mr. Wollam, the next question is as follows: Did you ever attend elementary school and if so where?

(Witness confers with counsel.)

Mr. Wollam. Mr. Chairman, in the dissenting opinions of Justice Douglas, Black, and Frankfurter the line of demarcation—

Mr. Velde. Young man, we are not going to listen to a long diatribe or a lot of advice on what the law is, as far as the Supreme Court decisions are concerned. Either answer the questions or refuse to answer. I will say that that if you will answer the questions as put to you by our counsel, then you might have the opportunity to go ahead and explain the law or anything that you want to, but you must first of all give us the courtesy of giving us an answer. By that I mean an answer of yes or no.

Mr. Wollam. I have refused to answer the question Mr. Chairman and I ask you for the courtesy of being permitted to state my reasons.

Mr. Velde. You have stated the reasons.

Mr. Wollam. I think these reasons are quite important. They are very important to me.

Mr. Velde. Will you proceed, Mr. Counsel?

Mr. Kunzig. Mr. Chairman, I think that we also ought to note that he was citing the dissenting opinion. This committee usually tries to follow the majority opinion of the Supreme Court.

Now on the last question you have refused. Now let me ask you this. Mr. Chairman, I have forgotten the record. Have you directed him to answer the question as to whether he went to the elementary school or not?

Mr. Velde. No.

Mr. Kunzig. Would you please direct him?

Mr. Velde. You are directed to answer the question as to where you attended elementary school, or whether you attended elementary school.

Mr. Kunzig. The question was where you attended and where was the exact way that I put it.

Mr. Wollam. Mr. Chairman, in view of the fact that I have no way of knowing as what time when I answer a question I will be waiving my rights to refuse to answer further questions that I know will follow from this committee, and since I have no intention of becoming a member of your stable of stool pigeons I am going to stand upon my constitutional rights and decline to answer the question upon the grounds of the first and fifth amendments and—

Mr. Velde. Now we are not going to listen to any more of this diatribe such as calling us a stable of stool pigeons. I am sure that your mother wouldn't appreciate your saying something like that and I am sure that the rest of the decent people in this area don't appreciate your making such wild and absurd and ridiculous statements, and so we are not going to listen to anything further.

Counsel, do you have any other important questions that you want to ask this witness?

Mr. Kunzig. Just a few more, Mr. Chairman. I want this witness to have a full opportunity to answer these questions.

Did you ever attend high school, Mr. Wollam.

(Witness confers with counsel.)

Mr. Wollam. As an overseas war veteran, Mr. Chairman; 11 months in German prison camp, I stand upon the Constitution of the United States, the same provisions that I cited earlier.

Mr. Kunzig. Now did you ever attend college, Mr. Wollam? Mr. Chairman, will you please direct the witness to answer that question?

Mr. Velde. Yes, you are directed to answer the question as to your—was it high school? Was that the last question?

Mr. Kunzig. Yes, high school. The question exactly as it appears in the record.

Mr. Wollam. And I will again decline to answer and on the same grounds that I gave before. And I might add, Mr. Chairman, that if you are interested—

Mr. Kunzig. Did you ever attend college?

Mr. Wollam. The same answer and the same reason.

Mr. Kunzig. I respectfully request that the witness be directed, Mr. Chairman, to answer the question.

Mr. Velde. Yes, you are directed to answer.

Mr. Wollam. I refuse to answer, Mr. Chairman, same reason.

Mr. Kunzig. Now you said that you were an overseas veteran and you were in the Armed Forces of the United States. Were you in the Army, or the Navy, or the Marines, or what?

Mr. Wollam. I was in the Army.

Mr. Kunzig. And what was the highest rank or grade that you achieved?

Mr. Wollam. Private, first class.

Mr. Kunzig. Private, first class. Now were you a member of the Communist Party when you were a private, first class, in the United States Army?

(Witness confers with counsel.)

Mr. Wollam. Will you repeat that question, please?

Mr. Kunzig. Would the reporter please repeat it?

(The record was read by the reporter as follows:)

Now were you a member of the Communist Party when you were a private, first class, in the United States Army?

Mr. Wollam. I refuse to answer that question on the grounds of the fifth amendment and the decision of the United States Judge James Alger Fee in the case of *United States v. Johnson* (76 supp. 538, pp. 540, 541). I also invoke the first, fourth, ninth—

Mr. Kunzig. We understand that you invoke those.

Mr. Wollam (continuing). 10, 14th, the whole works.

Mr. Kunzig. That is perfectly clear to us now and you know that it is perfectly clear and there is no necessity to say anything more.

Now have you ever been a member of the Communist Party?

Mr. Wollam. I will answer all such inquiries as to my association with people, as to my religious or my political beliefs, or affiliations and so forth with these refusals and with these reasons. I don't feel that you have any right, and I again cite the decision of Judge James Alger Fee.

Mr. Kunzig. We understand that citation now. Now let me ask you, are you now a member of the Communist Party?

Mr. Velde. Let the record show that counsel is pointing to what is apparently a prepared answer to that question and directing the witness to answer the questions according to certain printed material which he is holding before him.

(Witness confers with counsel.)

Mr. Wollam. I understand that I am allowed counsel even though counsel isn't permitted to address the committee. I can see no harm in his being of what small help you permit counsel to be at one of these hearings.

I am going to refuse to answer that last question on the grounds that I just gave based on the grounds of the fifth amendment and the decision of Judge James Alger Fee in the case of United States v. Johnson, (76 supp. pp. 538, 540, 541).

Mr. Kunzig. All right, I understand.

Mr. Wollam. Also, all the other—

Mr. Kunzig. Now we will go right on and let me ask you if it isn't true, and I repeat what you said a little earlier that we don't consider this to be funny at all, isn't it true that you are today—this very minute as you are sitting here in this courtroom of the United States courthouse before the Congress of the United States of America—a section organizer of District 11 Committee of the State of Oregon Communist Party right now in 1954? Isn't that correct?

Mr. Wollam. I refuse to answer that question on all the grounds I just gave, Mr. Chairman.

Mr. Kunzig. Mr. Wollam, have you ever been engaged in any espionage activities against the United States?

(Witness confers with counsel.)

Mr. Wollam. I consider that to be a trap question, Mr. Kunzig, and I will give you the same answer that I have given you on all of the other questions that are in that line.

Mr. Kunzig. Now just let me refute something that you said a few moments earlier. This does not involve associations, personnel, friends, religious beliefs, any of those things that you have been talking about. This involves loyalty to the United States of America and your behavior with regard to espionage. Have you ever been involved in any espionage activities? I ask you once again.

Mr. Wollam. Same question, same answer.

Mr. Kunzig. I think it is perfectly obvious the position of this witness, Mr. Chairman. No further questions.

Mr. Velde. Mr. Frazier?

Mr. Frazier. No questions.

Mr. Velde. I must say that by your conduct here you have certainly destroyed my faith in you as a witness and you as an American citizen in refusing to give up any information whatsoever which might help us. With that you are excused from the witness stand, and discharged from your subpena.

Mr. Wollam. Could I have an opportunity to answer your last statement, Mr. Chairman?

Mr. Velde. No; you are dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ROGERS MAC KENZIE, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

No. 14,745
May 2, 1957

Appeal from the United States District Court for the District of Oregon

Before: FEE, CHAMBERS and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

This is the third case in a series having similar facts involving conviction for refusal to answer questions propounded by a Congressional committee. All involve the question of Fifth Amendment coverage.

The first case was Simpson v. United States, 9 Cir., F.2d . The second was Wollam v. United States, F.2d , decided this date.

To give the setting as the trial court had it, we set forth the record of the examination of MacKenzie which was received in evidence:

"TESTIMONY OF JOHN MacKENZIE, ACCOMPANIED BY HIS ATTORNEY, IRVIN GOODMAN

Mr. Kunzig. Would you give your full name please, sir?

Mr. MacKenzie. John MacKenzie.

Mr. Kunzig. Would you spell it please?

Mr. MacKenzie. M-a-c-K-e-n-z
-i-e.

Mr. Kunzig. I notice that you are accompanied by counsel. Would counsel please state his name and office address for the record?

Mr. Goodman. My name is Irvin Goodman. My Portland address is Portland Trust Building. Telephone Atwater 7494.

Mr. Velde. Thank you, sir.

Mr. Kunzig. Mr. MacKenzie, what is your present residence?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question for the following reasons: On the grounds of the fifth amendment, I refuse to answer that question upon the grounds of the first and the fifth amendments.

Mr. Kunzig. I respectfully request, Mr. Chairman, that the witness be directed to answer the question as to what is his residence.

Mr. Velde. Yes, again that is a simple question, one that you can understand, one that this committee is en-

titled to ask under the law, and you are, therefore directed to answer the question.

Mr. MacKenzie. Mr. Chairman, I respectfully submit I decline to answer that question on the same grounds.

Mr. Kunzig. Mr. Reporter, in order to be absolutely certain because of the possibility of a contempt citation here of the question would you go back and repeat the question as I asked it first before the direction of the chairman that the man should answer the question. I want to be sure that I used the same words.

(The question is repeated as follows:)

"Mr. MacKenzie, what is your present residence?"

Mr. Kunzig. The question was, 'What is your present residence?' You then refused to answer and in order that the same exact words may be asked again, Mr. Chairman, I respectfully ask again that the witness be directed to answer the question: What is your residence, your present residence?

Mr. MacKenzie: Mr. Counsel, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Would you so direct the witness, Mr. Chairman, please?

Mr. Velde. Yes, you are directed to answer that question as to your residence.

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Mr. MacKenzie, where are you employed?

Mr. MacKenzie. Mr. Counsel, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Velde. You are directed to answer that question. Again this committee certainly has the legal right to determine your legal employment.

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Were you ever a member of the John Reed Club of the Communist Party?

Mr. MacKenzie. Mr. Counsel, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Did you ever attend Reed College?

Mr. MacKenzie. I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Mr. Chairman, I didn't know that it was incriminating to attend Reed College.

I therefore respectfully request that the witness be directed to answer the question.

Mr. Velde. Yes, the witness is directed to answer that question.

Mr. MacKenzie. Mr. Chairman, if I may, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Velde. I want to say right here, I would like to make the statement, that as far as Reed College is concerned let there be no inference drawn of disloyalty on the part of any of the professors or students at Reed

University unless there is actual evidence presented here concerning subversive influences. The fact that there might be some Communists on the campus at the Reed University is no different from any other educational institution in the country. I, therefore, want it particularly known that people in this community and elsewhere should not draw any unreasonable inferences of disloyalty on the part of Reed University generally.

We are interested, as I said before, in uncovering communistic activities, subversive activities, wherever they might be found, and we will continue along that line. We are not investigating education by any stretch of the imagination in any way.

Proceed, Mr. Counsel.

Mr. Kunzig. What is your present age, sir?

Mr. MacKenzie. Mr. Counsel, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Mr. Chairman, I respectfully request that the witness be directed to answer the question as to his age.

Mr. Velde. Certainly you are directed to answer the question as to your present age.

Mr. MacKenzie. Mr. Chairman, I refuse to answer the question on the grounds of the fifth amendment.

Mr. Velde. You're just not going to answer any question; are you?

Mr. MacKenzie. Mr. Chairman, if you'll ask the questions I will give my answers.

Mr. Velde. If I ask the questions, you'll what?

Mr. MacKenzie. Give my answers.

Mr. Velde. Well, all right, I will. Have you ever been a member of the Communist Party?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Velde. Now you just got through telling me that you would; if I'd ask you the questions you would answer them. Now you refuse to answer them. Go ahead, Mr. Counsel.

Mr. Kunzig. Isn't it a fact, Mr. MacKenzie, that Communist Party meetings were held in your home?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment?

Mr. Kunzig. Mr. MacKenzie, isn't it a fact that you have been a member of the Communist Party within the knowledge of this committee to at least February of 1954?

Mr. MacKenzie. Mr. Chairman, I refuse to answer that question on the grounds of the fifth amendment.

Mr. Kunzig. Mr. Chairman, I have no further questions to ask of this witness.

Mr. Velde. Do you have any questions, Mr. Frazier?

Mr. Frazier. No questions.

Mr. Velde. I have no further questions and the witness is discharged. I would like to make a statement that the testimony of the witnesses who appear here be-

fore the committee will be studied at a later date to resolve the question of contempt. At the present time we do not have a quorum of the full committee here, we do not have the time otherwise to make a study of this testimony and it will have to be in executive session at a later date. However, I must say that in my opinion, my humble opinion, there certainly has been contempt of the congressional committee and contempt of Congress displayed here today.

Mr. Kunzig. Mr. Chairman, just so that the record is clear, I want the record to show—you just mentioned there wasn't a quorum of the full committee and I want that to be clearly understood. There is, of course, a quorum of the subcommittee.

Mr. Velde. Yes, certainly, that is the case. The recommendation has to be made by a quorum of the full committee after being submitted by a quorum of the subcommittee which is present here.

Do you have anything more for today, Mr. Counsel?

Mr. Kunzig. No. Mr. Chairman, except for the fact that you have already stated. We will study the MacKenzie and Dyhr cases which are clear contempt matters."

MacKenzie was indicted and convicted on four counts for refusing to answer four questions:

1. Mr. MacKenzie, what is your present residence?

2. Mr. MacKenzie, where are you employed?

3. Did you ever attend Reed College?

4. What is your present age, sir?

Identical concurrent prison sentences were imposed. A fine of $250 was assessed on the first count. As pointed out in Simpson and Wollam, if the conviction can stand on count one, we need go no further.

On the appeal the defendant makes all of the points we had in Wollam except it is not here contended that there was no direction by Chairman Velde to the witness to answer.

What has been said in Wollam's case is applicable here. It can be said that the question propounded to MacKenzie on his age stands on the same footing as the one as to his residence. The two, as to legal consequence, seem indistinguishable. On the other two counts and the questions which precipitated them, we express no opinion.

Judgment affirmed.

(Endorsed:) Opinion. Filed May 2, 1957.

Paul P. O'Brien, Clerk.

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No. 131

In the Supreme Court of the United States

OCTOBER TERM, 1957

HERBERT SIMPSON, DONALD M. WOLLAM AND JOHN ROGERS MACKENZIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals in the *Simpson* case (4 Simp. R. 3–6)[1] is reported at 241 F. 2d 222. The opinions of the Court of Appeals in the *Wollam* and *MacKenzie* cases (Woll. R. 111–122; MacK. R. 100–104) have not yet been reported. The three opinions appear as Appendices A, B, and C, respectively, to the petition for a writ of certiorari (Pet. 31–60).

[1] The record in the *Simpson* case, which has not been printed, is in four volumes. We shall refer to it by the designation "Simp. R." with a figure prefix to indicate the number of the volume. The *Wollam* and *MacKenzie* records, which have been printed, will be referred to as "Woll. R." and "MacK. R.," respectively.

JURISDICTION

The judgment of the Court of Appeals in the *Simpson* case was entered on February 11, 1957 (4 Simp. R. 7), and a petition for rehearing was denied on April 13, 1957 (*id.* 8). The judgments of the Court of Appeals in the *Wollam* and *MacKenzie* cases were both entered on May 2, 1957 (Woll. R. 123; MacK. R. 117). By order of Mr. Justice Douglas, petitioner Simpson's time for filing a petition for a writ of certiorari was extended to June 12, 1957. The joint petition of the three petitioners was filed on May 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the circumstances reflected by this record, petitioners properly invoked their privilege against self-incrimination in refusing to tell the committee where they resided and to answer similar "identifying questions," on the theory that the answers to such questions would have tended to identify them as persons with respect to whom the committee had information tending to show Communist Party affiliations.

2. Whether the indictments were fatally defective in that—

(*a*) they allegedly failed to state the nature of the "question under inquiry" at the time of petitioners' appearances before the House Committee on Un-American Activities and refusals to answer questions;

(*b*) they allegedly failed to state that the refusals to answer were either "willful" or "unlawful";

(*c*) they failed to state specifically that the refusals to answer were "without just, proper or legal cause";

(*d*) they failed to specify wherein the questions which petitioners refused to answer were pertinent to the subject of inquiry.

3. Whether one charged under 2 U. S. C. 192 with refusal to answer questions of a congressional committee which were "pertinent to the question under inquiry" is entitled to have the issue of the pertinency of the questions heard and decided by the jury.

4. Whether a witness before a congressional committee who refuses to answer a pertinent question is immune to prosecution under 2 U. S. C. 192 by reason of the fact that the committee "already knows" the answer to the question or has information with respect thereto from other sources.

5. Whether the trial court properly refused to grant petitioner Simpson a subpoena *duces tecum* calling for all of the committee's files containing "information about" him.

6. Whether the trial court erred in—

(*a*) selecting the *Simpson* jury from the same panel from which the *Wollam* jury had been selected the preceding day;

(*b*) refusing to permit counsel for petitioner Simpson to interrogate an F. B. I. agent for the alleged purpose of attempting to show that the agent "had information" about Simpson which would have been relevant to the issue of the propriety of the latter's invocation of his privilege against self-incrimination;

(*c*) permitting "material acts of Congress, the committee and the subcommittee to be proved by parol

evidence without showing that the records of the alleged acts were unavailable";

(*d*) allegedly failing to provide petitioner Simpson with an opportunity to present evidence on the issues of pertinency and privilege outside the presence of the jury;

(*e*) allegedly sentencing petitioner Simpson "for something that [he] did not say."

STATUTE INVOLVED.

2 U. S. C. 192 (R. S. 102, as amended; 52 Stat. 942) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Petitioners—Herbert Simpson, Donald M. Wollam, and John Rogers MacKenzie—were charged in separate indictments, returned in the United States District Court for the District of Oregon, with having refused, in violation of 2 U. S. C. 192, *supra,* to answer

questions, pertinent to the matter under inquiry, put to them by a subcommittee of the Committee on Un-American Activities of the House of Representatives (1 Simp. R. 10–11; Woll. R. 3–4; MacK. R. 3–4). The indictments were in six, five, and four counts, respectively, the several counts setting forth the specific questions which the accused had refused to answer. Count 1 of each indictment charged refusal by the accused to state his place of residence at the time of his appearance before the committee. The remaining counts of the *Simpson* indictment—excluding the third count, which was later dismissed (2 Simp. R. 105–106)—charged refusal by Simpson to state whether it was not a fact that he lived at a designated address in Portland, Oregon (count 2), to give a resume of his educational background (count 4), and to state whether he had ever gone to high school (count 5), or ever served in the armed forces (count 6). The remaining counts of the *Wollam* indictment charged refusal by Wollam to state where he was employed (count 2), and whether he had ever attended elementary school (count 3), high school (count 4), or college (count 5). The remaining counts of the *MacKenzie* indictment charged refusal by MacKenzie to state where he was employed (count 2), whether he had ever attended Reed College (count 3), and his age (count 4).

Following separate trials by jury, each petitioner was found guilty on each count of the indictment involving him (with the exception of petitioner Simpson in respect of the dismissed count of his indictment, see *supra*) (1 Simp. R. 38; Woll. R. 29; MacK.

R. 24). Petitioners Simpson and MacKenzie were each sentenced to ten months' imprisonment and petitioner Wollam to one year's imprisonment on each count of their respective indictments, the terms to run concurrently, and each petitioner was in addition fined $250 on count 1 of his respective indictment (1 Simp. R. 43; Woll. R. 32; MacK. R. 27). On appeal to the Court of Appeals for the Ninth Circuit, the judgments of conviction were affirmed.

The evidence adduced by the Government at the trials may be summarized as follows:

Petitioners were three of a group of witnesses who were subpoenaed to testify before a subcommittee of the House Committee on Un-American Activities in public hearings held on June 18 and 19, 1954, in connection with an investigation which the committee was conducting into Communist activities in the Portland, Oregon, area (2 Simp. R. 21, 23–24; Woll. R. 49–50; MacK. R. 40). Each petitioner appeared before the committee, was sworn, and gave his name, but refused to answer any other questions propounded by the committee, including those forming the bases of the several counts of the respective indictments (see *supra*, p. 5), on the asserted ground, among others, that his answer would tend to incriminate him (2 Simp. R. 26–32; Woll. R. 52–56; MacK. R. 42–45). With respect to the questions involved in the indictments, each petitioner's claim of privilege was overruled by the committee and he was directed to answer (*ibid.*). The committee's questions included, in addition, whether petitioners were or ever had been members of the Communist Party, their claims of

privilege as to these questions being accepted by the committee.[2]

DISCUSSION

1. Of the six questions which petitioner Simpson alleges are presented (Pet. 2–5), and in which petitioners Wollam and MacKenzie join (Pet. 25–27), the fourth question raises, we believe, the only serious problem and will be discussed first:

Petitioner Simpson contends (Pet. 16–21) that his invocation of the privilege against self-incrimination with respect to each of the questions involved in the several counts on which he was convicted (see *supra*, p. 5) was proper because "a witness who rightfully exercises the privilege under the Fifth Amendment as to questions on which the inquiring committee has incriminating evidence against the witness, may also exercise the privilege as to identifying questions which would identify him as the person against whom the committee has that incriminating evidence" (Pet. 16–17). In other words, Simpson urges (see Pet. 18–20) that, since he properly invoked his privilege when questioned as to his Communist Party affiliations (see *supra*, pp. 6–7, and *Blau* v. *United States*, 340 U. S. 159), he had a concomitant right, in view of the fact that the committee had information that he

[2] The pertinent portions of the transcript of the committee proceedings relating to petitioners Wollam and MacKenzie, containing in their context the questions asked and the refusals to answer, are set forth in the respective opinions of the Court of Appeals. See Woll. R. 116–122 (Pet. 42–52); MacK. R. 100–104 (Pet. 54–59). For the pertinent part of the transcript of the committee proceedings relating to petitioner Simpson, see H. Rep. 2463, 83d Cong., 2d sess., as copied at 100 Cong. Rec. 11628–30.

was a Party member (2 Simp. R. 25; Pet. 18–20), to refuse to answer "identifying questions," the answers to which would establish that he was the person in respect of whom the committee had such information, because to give such answers would have "furnished a link in the chain of evidence needed in a prosecution of [him] for violation of (or conspiracy to violate) the Smith Act" (*Blau* v. *United States, supra,* 340 U. S. at 161).

We feel constrained to agree that, on the particular facts of this case, answers to the identifying questions might have tended to be incriminating. At least, we think, "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case,'" that the answers could not "'possibly have such tendency' to incriminate" (*Hoffman* v. *United States,* 341 U. S. 479, 488, quoting with approval from *Temple* v. *Commonwealth,* 75 Va. 892, 898; emphasis in the original). Disclosure of one's residence might prove incriminating if Party meetings were, as here, alleged to have been held there.[4] Answers to questions relating to educational background and military

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[3] The committee also had information concerning Party activities and associations on the part of petitioners Wollam and MacKenzie (Woll. R. 50; MacK. R. 42).

[4] Apart from the fact that the answers to the questions would have tended to identify the petitioners as the persons with respect to whom the committee had evidence showing Communist Party affiliations, the committee appears to have had information that Communist Party meetings were held in the home of one of these petitioners (MacKenzie) (Pet. 28)—a fact which, if true, would have been an added reason why that petitioner, at least, might genuinely have feared that to disclose his residence (count 1) would have been incriminating.

service might also serve to identify the witness as the person who had been accused by other witnesses of having engaged in Party activities at certain times and places, such as at Reed College. Even the question as to age (count 4 of the MacKenzie indictment), if answered, might have identified the witness as the person who, while attending Reed College (see count 3 of the MacKenzie indictment), engaged in Communist Party activities.

We recognize, of course, that the protection furnished by the Fifth Amendment "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer," and "his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States, supra,* 341 U.S. at 486. The danger, in short, must be "real and appreciable," not merely "imaginary and unsubstantial." *Mason* v. *United States,* 244 U. S. 362, 365–366. For this reason, identifying questions are normally not incriminating. However, under the special facts here presented, we do not believe it can be fairly said that petitioners could not possibly have feared that to answer the questions would have been incriminating. Cf. *Hoffman* v. *United States,* 341 U. S. 479; *Brunner* v. *United States,* 343 U. S. 918; *Singleton* v. *United States,* 343 U. S. 944; *Trock* v. *United States,* 351 U. S. 976. And see *Emspak* v. *United States,* 349 U. S. 190, 198–201.

Accordingly, it is our view that the convictions cannot be sustained, and we respectfully suggest that the Court grant the petition for a writ of certiorari and

that the judgments be reversed without further briefs or argument.

There is no merit, we believe, to the other points raised by petitioners.

2. Petitioners contend that the indictments should have been dismissed as fatally deficient on several grounds (Pet. 10–13, 25).

(*a*) The point (Pet. 10–11, 25, 27) that the indictments were deficient for failing "to set forth the question under inquiry" (Pet. 10) by the committee at the time of petitioners' appearances is substantially identical with one of the contentions made in the petition for certiorari in No. 742, Oct. Term, 1956, *Lloyd Barenblatt* v. *United States,* certiorari granted and reversed on other grounds on June 24, 1957. Here, as there, each of the indictments alleged that the committee "was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress," and that the accused appeared and refused to answer questions "which were pertinent to the question then under inquiry."[5] Our reply in *Barenblatt* (Br. in Opp., pp. 14–16) is accordingly applicable to this case.

As we there point out (at p. 15), the reference to "Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828)" and "H. Res. 5, 83d Congress" is a reference to the House Rule (XI) under which the Committee on Un-American Activities operates, which Rule (see Pet. 6–7) confers on the committee the authority to investigate "the extent, character, and ob-

[5] 1 Simp. R. 10; Woll. R. 3; MacK. R. 3.

jects of un-American propaganda activities in the United States," "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation." We believe that this is a sufficiently explicit statement of the "question under inquiry" to satisfy the requirement of Rule 7 (c) of the Federal Rules of Criminal Procedure (see Pet. 7) that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged"—particularly where, as here, petitioners have never contended, and do not now contend, that they were unaware of the nature of the "question under inquiry" by the committee (see Rule 52 (a), F. R. Crim. P.).

(*b*) Also without merit is the contention (Pet. 11–12, 25, 27) that each indictment was fatally deficient for failing to allege that the accused's refusal to answer questions was either "willful" or "unlawful" (Pet. 11). Each indictment charged that the refusal was "in violation of" 2 U. S. C. 192.[6] This was a plain allegation that the refusal was unlawful. No more, as petitioners concede (Pet. 11), was required. *United States* v. *Deutch*, 235 F. 2d 853, 854 (C. A. D. C.). Furthermore, as noted in *Deutch*, and as the court below also pointed out (Pet. 33–34), "[t]o decline or refuse to answer a question * * * is by its

[6] 1 Simp. R. 11; Woll. R. 4; MacK. R. 4.

very nature a deliberate and willful act" (235 F. 2d at 854).[7]

(*c*) Petitioner Simpson's related contention (Pet. 12–13)—that the indictment was defective for failing to aver that his refusals to answer were "without just, proper or legal cause" (Pet. 12)[8]—is equally without substance. The allegation that the refusals were "in violation of" 2 U. S. C. 192 (1 Simp. R. 11) in effect charged that they were made without just cause, and, in any event, under Rule 7 (c), F. R. Crim. P. (see *supra*, p. 11), an indictment need not negative the existence of affirmative defenses. *Eisler* v. *United States*, 170 F. 2d 273, 280–281 (C. A. D. C.), certiorari dismissed, 338 U. S. 883.

(*d*) Petitioners' final argument relating to the sufficiency of the indictments (Pet. 13, 25, 27)—that they were defective for failing to specify the pertinency of the questions to the subject of the committee's investigation—is likewise without merit. Each indictment charged that the questions "were pertinent to the question then under inquiry" (1 Simp. R. 10; Woll. R. 3; MacK. R. 3). Precisely in what respect or respects the questions were pertinent was essentially an evidentiary matter, and it is not the function of an indict-

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[7] The jury was instructed in each case that to convict it must find the accused's refusals to have been "deliberate and intentional as distinguished from accidental or inadvertent or unintentional" (2 Simp. R. 126; Woll. R. 98; MacK. R. 87). This instruction correctly defined the nature of the intent required to be proved under 2 U. S. C. 192. *Quinn* v. *United States*, 349 U. S. 155, 165; *Sinclair* v. *United States*, 279 U. S. 263, 299.

[8] Petitioners Wollam and MacKenzie also make this contention (Pet. 25, 27), but neither presented it in the courts below.

ment to set forth evidence. See Rule 7 (c), F. R. Crim. P. (*supra*, p. 11). Moreover, even assuming, *arguendo*, that an indictment under 2 U. S. C. 192 should state not merely that the questions which the accused refused to answer were pertinent, but how they were pertinent, the failure to set forth the details establishing the latter would be at most a "defect" or "irregularity" which, because it would "not affect substantial rights," should "be disregarded" (Rule 52 (a), F. R. Crim. P.).[9]

Petitioners' reliance (Pet. 13) on *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2), is misplaced. That decision turned on the fact that the indictment there involved "on its face charge[d] no offense" (*id.* at 315) because the questions which the accused in that case were charged with having refused to answer were concerned exclusively with their "possible participation in or knowledge of subversive or leftist activities" (*id.* at 313), whereas the authority of the committee before which the refusals were made (a subcommittee of the Senate Committee on Government Operations) was limited to "studying the operation of Government activities * * * with a view to determining its economy and efficiency" (*id.* at 315).

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[9] That the questions in issue were in fact pertinent is, we submit, clear. The count 1 question in each indictment related to the accused's place of residence at the time of his appearance before the committee. As observed by the Court of Appeals, "Where the question * * * is obviously simply one of identification of the witness the pertinency is not obscure. * * * Testimony of any kind must be laid stone on stone. The first relevant point is: Who is the witness, anyway? * * *" (Pet. 37–38).

3. Petitioners' contention (Pet. 14–15, 25, 27) that they were entitled to "trial by jury on the issue of pertinence" (Pet. 14) is also without any merit. This precise contention was rejected by this Court in *Sinclair* v. *United States*, 279 U. S. 263, 298–299, where it was held that "[t]he question of pertinency" under 2 U. S. C. 192, like "the question as to materiality of false testimony charged as perjury in prosecutions for that crime," is "one for the court" (279 U. S. at 298).[10]

4. Petitioner Simpson urges that his conviction on count 1 (refusal to state his residence) cannot stand because the committee allegedly already knew where he lived, so that the asking of the question could not have "serve[d] a legislative purpose" (Pet. 16).[11] That the committee already knew where he lived, he says, is clear from its subsequent question, "Isn't it a fact that you live at 9115 North Geneva, Portland,

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[10] See also *Keeney* v. *United States*, 218 F. 2d 843, 845, 846, 849 (C. A. D. C.). *United States* v. *Orman*, 207 F. 2d 148, 155–156 (C. A. 3), cited by petitioners (Pet. 14–15), is distinguishable. It was there held that, where "evidence *aliunde* was introduced to prove pertinency," it was "proper" for the court, if satisfied that "pertinency has been proven," to "submit the question and the evidence to the jury under appropriate instructions" (207 F. 2d at 156). The decision does not hold that a defendant in a prosecution under 2 U. S. C. 192 has a right to have the issue of pertinency submitted to the jury, but merely that it was not error in the circumstances of that case to do so, provided the court first satisfied itself that pertinency was established. The defendant in *Orman* was contending that the trial court had erred in submitting the issue of pertinency to the jury (207 F. 2d at 155)—the precise opposite of petitioners' contention.

[11] Petitioners Wollam and MacKenzie seek to adopt this contention by reference (Pet. 25, 27). Neither, however, raised the issue in the Court of Appeals.

Oregon?" (*ibid.*). At least, he argues, he should have been permitted to "adduce conclusive evidence that the Committee knew" his place of residence (*ibid.*).

Obviously, however, a committee may ask a witness a question designed to confirm or substantiate previously elicited testimony or information. Cf. *Young* v. *United States*, 212 F. 2d 236, 239 (C. A. D. C.), certiorari denied, 347 U. S. 1015. The fact that a committee may have certain information in its files does not prevent it from seeking to verify the information by questioning the person best qualified to supply such verification—in the case of an address, the person reported as living there. As noted by the Court of Appeals, "The informal knowledge one has of where a witness lives and of his identity may be entirely erroneous" (Pet. 35).

5. Simpson's contention (Pet. 21–22) that it was error for the trial court to deny his motion for a subpoena *duces tecum* calling for all of the committee's files containing "information about" him (1 Simp. R. 31)[12] is clearly insubstantial. The sole purpose of the request, as observed by the trial court in denying the motion, was to attempt to prove that the committee "already had some information concerning the matters called for by the questions in the indictment" (2 Simp. R. 3; see also 1 Simp. R. 32). Since, as we

[12] Like motions were made by Wollam and MacKenzie (Woll. R. 8–9; MacK. R. 9–10), but those petitioners failed to challenge the orders of denial on appeal. Hence, their attempt to incorporate the present contention of petitioner Simpson by reference (Pet. 25, 27) is misconceived. The orders of denial were in any event correct for the same reasons for which the order of denial in Simpson's case was proper.

have already pointed out (*supra*, p. 15), that fact would have been irrevelant, the court correctly refused to issue the subpoena. Cf. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 219.

6. In petitioner Simpson's sixth and final point he groups five additional alleged errors of the trial court (Pet. 22–23).[13]

(*a*) It is argued that it was error for the court to select the *Simpson* jury from the same panel from which the *Wollam* jury had been selected the preceding day (Pet. 22). It is settled, however, that a juror is not disqualified to sit in successively tried cases against different defendants charged with similar but independent offenses, even though the evidence in the two cases may be similar and the witnesses the same, so long as each juror is able (as here) to avow at the *voir dire* examination that he is capable of deciding the second case fairly and impartially. *Wilkes* v. *United States*, 291 Fed. 988, 990 (C. A. 6), certiorari denied, 263 U. S. 719; *Haussener* v. *United States*, 4 F. 2d 884, 886 (C. A. 8); *Belvin* v. *United States*, 12 F. 2d 548, 550 (C. A. 4), certiorari denied, 273 U. S. 706. Furthermore, since Simpson has never disputed and does not now dispute that he did appear before the committee and did in fact deliberately and intentionally refuse to answer the committee's questions as charged—these being the only issues which the jury was called upon to decide (see 2 Simp. R. 127)—

[13] While petitioners Wollam and MacKenzie seek to adopt the point by reference (Pet. 25, 27), most of the alleged errors listed under it are inapplicable to those petitioners, and none was urged by either in either court below.

there is no basis for a charge of prejudice in any event, and Simpson does not charge that he was actually prejudiced by the procedure followed.

(*b*) It is then argued that the court erred in "refus[ing] to permit the Portland agent of the F. B. I. to answer questions propounded to him to show that the United States had information, which was made available to the committee, that justified petitioner in exercising his privilege under the Fifth Amendment to refuse to answer each of the questions on which the indictment was based" (Pet. 23).

This contention misstates the record. There was no suggestion at the trial that the purpose of the questions which Simpson's counsel propounded to the F. B. I. agent, Mr. Santoiana, was, as Simpson now claims (*supra*), "to show that the United States had information, which was made available to the committee, that justified petitioner in exercising his privilege under the Fifth Amendment to refuse to answer each of the questions on which the indictment was based." The record indicates no more than that the court sustained government objections to two questions by Simpson's counsel—(1) whether the agent "ha[d] any information regarding" Simpson prior to the time of the latter's appearance before the committee, and (2) whether the agent had consulted with or been consulted by members or employees of the committee (2 Simp. R. 92). Counsel made no offer of proof, nor did he even suggest, that the purpose of the questions had any relation to the propriety of Simpson's claim of privilege under the Fifth Amendment. The actual purpose of the questions was merely to at-

tempt to show that the committee "already had" the information which it sought to elicit from Simpson by the questions which he refused to answer as charged in the indictment—a fact which, if true, was, as we have seen, irrelevant (*supra*, p. 15). That this was the true purpose of the questions is clear from the statement in Simpson's main brief in the Court of Appeals (p. 19) that "[a]ppellant tried to prove by the records of the Committee itself and through the testimony of the head of the F. B. I. office in Portland that both agencies of the Government knew unqualifiedly the answers to each of the six questions that are involved in this case." Thus, the present attempt to inject the Fifth Amendment into the issue of the propriety of the trial court's sustaining of the Government's objection to the questions propounded to the F. B. I. agent has no record justification."[14]

(*c*) It is said that the trial court erred in permitting "material acts of Congress, the committee and the subcommittee to be proved by parol evidence without showing that the records of the alleged acts were unavailable" (Pet. 23).

The parol evidence complained of was the testimony of the committee counsel concerning such matters as the sources of the authority of the House Committee on Un-American Activities and of the subcommittee before which the petitioners appeared (2 Simp. R. 15–20). Such testimony is not incompetent. Cf. *In re Ko-ed Tavern*, 129 F. 2d 806, 810 (C. A. 3); *Her-*

[14] Simpson's first suggestion that the Fifth Amendment was in any way germane to the questions propounded to the agent was made in his reply brief in the Court of Appeals (at p. 19).

zig v. *Swift & Co.*, 146 F. 2d 444, 446 (C. A. 2); 4 Wigmore, *Evidence* (3d ed. 1940), § 1178. In any event, no difference between the witness's testimony and the public records establishing the facts is asserted. Accordingly, there is no basis for any claim of prejudice, and, in fact, none is claimed.

(*d*) Another point is that the trial court erroneously "failed to provide opportunity to petitioner [Simpson] to present evidence on [the] issues [of pertinency and privilege] outside the presence of the jury" (Pet. 23).

The record indicates that counsel for Simpson first made his request for leave to present evidence on these issues "outside the presence of the jury" in a motion for a new trial (1 Simp. R. 40, 41; 3 Simp. R. 33–34, 38), filed five days after the trial and verdict. The trial judge pointed out to counsel for Simpson, during oral argument on the motion, that he (the judge) had asked Mr. Goodman, counsel for petitioner Wollam, on the day preceding the *Simpson* trial and during the *Wollam* trial, whether Mr. Goodman desired to try the issues of pertinency and privilege outside the presence of the jury; that Mr. Goodman told the judge he "wanted it to be heard in the presence of the jury," which course the judge permitted; that counsel for Simpson was "present in the courtroom" during that colloquy, so that he "could not have been in any doubt at all" as to the judge's "attitude in the matter" and of his privilege of adducing evidence on these issues, if he desired to, during the trial, either within or without the jury's presence (3 Simp. R. 38; see also *id.* 33–34). Such a

request, the judge further remarked, would have been granted "at the drop of a hat" if counsel "had asked for it" (*ibid.*).

While, for the foregoing reasons, the judge declined to grant the motion for a new trial or otherwise to reopen the case for the purpose of taking evidence on the issues of pertinency and privilege (3 Simp. R. 42), he invited counsel to, "if he wishes, add any showing that he wants to the record so that he will have a full record if an appeal is desired" (*id.* 44; see also *id.* 45). Nothwithstanding this explicit invitation, counsel at no time thereafter, either in the trial court or the Court of Appeals, made any offer of proof, nor did he in any way indicate the nature of the evidence he had proposed to adduce on those issues, nor, indeed, does he do so now. Under these circumstances, we submit that there was no abuse of discretion in the denial of the motion by the trial court, nor is there any basis for a claim of prejudice.

(*c*) There is, finally, no basis for petitioner Simpson's contention that he was sentenced to the punishment which was imposed "for something that [he] did not say" (Pet. 23). The record shows that the trial judge's passing reference to "this Government that you [Simpson] condemned or condemn," which he made immediately prior to his imposition of sentence (3 Simp. R. 62), was merely the judge's characterization of certain views critical of the Government which Simpson had a moment previously ex-

pressed in a pre-sentencing statement to the court (see *id.* 55–58).[15]

CONCLUSION

For the reason stated *supra*, at pp. 7–10 it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgments be reversed without further briefs or argument.

J. LEE RANKIN,
Solicitor General.

JULY 1957.

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[15] In a section of the petition for certiorari under the heading "joinder of petition by Donald M. Wollam and John Rogers MacKenzie" (Pet. 25), petitioners Wollam and MacKenzie state as a "question presented," which they say should be answered in the negative, but which they do not otherwise discuss or mention, the question of whether the committee chairman instructed them to answer the questions which they were charged in their indictments with having refused to answer "in accordance with the strict standards required by" this Court in *Quinn* v. *United States*, 349 U. S. 155, and *Emspak* v. *United States*, 349 U. S. 190 (*ibid.*). The committee proceedings involving these petitioners, which are respectively set forth *verbatim* in the *Wollam* and *MacKenzie* opinions in the Court of Appeals (Pet. 42–52, 54–59), show this contention (which was made for the first time in the Court of Appeals) to be wholly without merit.

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